No. 678

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

FLAMBEAU PLASTICS CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

and

LOCAL NO. 380, INDUSTRIAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To The Justices Of The Supreme Court Of The United States:

Flambeau Plastics Corporation, Petitioner herein, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for

the Seventh Circuit, entered on August 29, 1968, denying Flambeau Plastic Corporation's petition to review an Order of the National Labor Relations Board dated October 12, 1967 and granting the National Labor Relations Board's Cross-Petition for enforcement of that same Order.

OPINIONS BELOW

The decision and order of the National Labor Relations Board, hereafter "Board," is reported at 167 NLRB No. 102 (1967). The decision of the Court of Appeals is reported at ..... F.(2d) ....., 58 CCH Lab. Cas., Par. 12,864, and is presented in the Appendix hereto at pp. App. 18-19.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was made and entered on August 29, 1968, and a copy thereof is printed in the Appendix at pp. App. 20-23.

The jurisdiction of this Court is invoked pursuant to 28 USC §1254(1).

QUESTIONS PRESENTED

The questions presented here are both important to the future administration of the National Labor Relations Act in that they relate to the rights of labor and management when their dispute is resolved in the penumbra of the legislation. This case gives the Court the opportunity to clearly enunciate on the following substantive questions:

1. Where there is clear and uncontroverted proof on the record that a minority of employees supported a strike at the outset and in due course, acting on this evidence the employer withdrew recognition of the union, should the employer be found guilty of violating §8(a)(5) and ordered to reinstate recognition on the ground that it has also been found guilty of other well articulated and technical violations of the Act.

2. Is an employer guilty of violating §8(a)(3) within the rationale of *NLRB* v. *Great Dane Trailers*, 388 U.S. 26, where he denies paid vacations to strikers during the progress of the strike even though vacation and pay therefor do not accrue under the expired bargaining agreement or the continuing practice, the strikers were ineligible for vacations or pay therefor and the employer's denial is based upon good faith belief it was asserting its contract rights.

PROCEEDINGS BELOW

These proceedings grow out of an unfair labor practice charge filed by Local No. 380, Industrial Union, Allied Industrial Workers of America, AFL-CIO (hereafter "Union") on February 18, 1966. This charge was amended on May 3, 1966 and thereafter, on July 8, 1966 the Board issued its complaint (No. 30-CA-351). On August 19, 1966 the hearing opened. Prior to decision by the Trial Examiner, the Union filed an additional charge and an additional complaint was issued (No. 30-CA-455). A motion was made by General Counsel for the Board and granted to reopen the earlier cases and consolidate the later complaint with it. The supplemental hearing was then held.

On May 25, 1967 the Trial Examiner issued his decision finding Petitioner guilty of all charges except one upon which he made no ruling.

Upon exceptions being filed by all parties on October 13, 1967, the Board affirmed the Trial Examiner and additionally found Petitioner guilty of the charge which the Trial Examiner had overlooked.

Petitioner sought a review of the Board's order in the Court of Appeals for the Seventh Circuit and the Board cross petitioned for enforcement. On August 2, 1968, the Court of Appeals rendered its decision denying review and granting the Board's demand for enforcement. The Court's judgment was entered August 29, 1968.

STATUTES INVOLVED

The pertinent portions of the National Labor Relations Act (hereafter "Act") (61 Stat. 136, 29 USC 151, et seq.) are as follows:

> "Section 8(a). It shall be an unfair labor practice for an employer . . .
>
> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;
>
> "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization; . . .
>
> "(5) to refuse to bargain collectively with the representatives of his employees . . . . "

STATEMENT OF THE CASE

On March 5, 1963, the Union was certified as the collective bargaining agent of certain employees at Petitioner's Baraboo, Wisconsin, plant.

Following collective bargaining, on May 17, 1965 the Company and Union entered into a contract covering wages, hours and conditions of employment. The contract term was for one year ending May 17, 1966.

On May 15, 1966, employees attending a Union meeting voted 51 to 3 to strike. On June 5, 1966, another strike vote was taken and employees present voted 66 to 1 to strike.

On June 15, 1966, 91 of the 212 unit employees went out on strike.

Prior to June 15, the Union had filed two unfair labor practice charges with the Board. The first of these claimed that the Company refused to bargain because an Employee Handbook which had been issued, in more or less the same form, since 1960 and *about* which the Union had never previously complained or requested to bargain was denigrating to the Union. The second charge concerned the Company's formulation of a training program about which it had submitted questions in the form of a Unit Clarification Petition to the Board. Although *implementation* of the program was not at issue, the Union charged that the Company had a duty to bargain about the mere *formulation* of the program before submitting it to the processes created by the Act.

Additionally, after the strike began the Union charged and the Board complained that Petitioner had refused to bargain in good faith during negotiations intended to lead to a new contract; had attempted to bargain directly with employees; had illegally assisted non-strikers in resigning from the union; had illegally surveyed the picket line by taking pictures of strikers; had intimidated strikers by advising non-strikers that it had a record of non-employees who picketed; had increased wages faster than it had offered the union in negotiations; had told prospective employees it would never accede to union demands; and had threatened a strike with retaliation.

During the course of the strike, a number of strikers returned to work at Flambeau, others found employment elsewhere and many new employees were hired. On September 8, 1966, there were 64 strikers believed to be available to return to work and there were 115 permanent employees working in the plant. On September 15, 1966, the Company withdrew recognition from the Union.

Consistent with its long-established practice, the Company agreed with the Union's request to insert a vacation clause in the 1965 contract. As written, this clause limited eligibility for vacation pay to those employees continuously on the payroll for the year preceding August 1 and who "work up and through the last scheduled workday prior to the declared vacation period." The contract further stated that "vacation pay is incidental to vacation time off and is not considered to accrue for each day or month of employment." Although the contract had expired, the Company scheduled vacations under the terms of its contract in 1966. These vacations were scheduled and taken starting on August 1, 1966. As striking employees had not worked "up and through" the last working day prior to August 1, 1966 and had no accrued rights under the contract they did not receive vacation pay unless they had returned to work during the year.

As noted *supra,* the Board found Petitioner guilty of all charges. On appeal pursuant to Section 10(f) of the Act, the Court below affirmed specifically holding the withdrawal of recognition a violation of §8(a)(5) and the denial of vacation pay to strikers a violation of §8(a)(3).

The Court below granted enforcement of the Board's order without modification.

REASONS FOR GRANTING THE WRIT

A. The Question of Withdrawal of Recognition.

It is generally the rule that where the employer has independent and substantial evidence which raises a good faith doubt in his mind as to the majority status of the Union, he is free to withdraw recognition or, at his option, to file a representation petition under Section 9(c)(1)(B) of the Act one year after certification of a Union. See *Brooks* v. *NLRB*, 348 U.S. 96 (1954).

> "The question of whether an employer is acting in good or bad faith at the time of the refusal (to bargain) is . . . one which of necessity must be determined in the light of all relevant facts in the case." *Joy Silk*, 185 F. (2d) 732, 185 F. (2d) at 742 (C.A.D.C. 1950) *cert. den.* 341 U.S. 914.

The existence of the "good faith" requirement is determined by the judicial combination of the extrinsic record evidence which led to the employer's decision to act as he did and the acts of the employer which preceded the withdrawal of recognition. E.g., *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702 (1944).

It is recognized that because it is illegal for an employer to interrogate his employees as to their union sympathies, the employer may rely on extrinsic evidence in an effort to determine the degree of union support among unit employees. See *Stoner Rubber Co.*, 123 NLRB 1440 (1959) where the Board said, at p. 1445:

> "An employer can hardly prove that a union no longer represents a majority since he does not have access to the union's membership lists and direct interrogation of employees would probably be unlawful as well as of dubious validity. Accordingly, to overcome the

presumption of majority the employer need only produce sufficient evidence to cast serious doubts on the union's continued majority status."

It cannot be said that there was not ample evidence to show the employer that employee support for the Union was waning:

On May 4, 1966, a union shop referendum, required under Wisconsin law, indicated Union support of 113 to 21.

On May 15, 1966, only 54 unit employees showed up at a strike-vote meeting.

On June 5, 1966, only 67 unit employees bothered to show up at another strike-vote meeting.

On June 15, 1966, *less than one-half* of the unit employees walked out on strike.

On September 8, 1966, there were only 64 strikers who were believed available to return to work and there were 115 working employees. Only about *one-third* of the unit employees were on strike.

During oral argument before the Court below, Judge Swygert inquired, "Aren't unions now a fact of life?" Of course they are, but so is employee *free choice.* It is respectfully submitted that Congress, in drafting the Taft Hartley Act, intended to protect the rights of employees to have or to reject unionization. Flambeau's employees have clearly rejected the Union on the basis of the facts enumerated above.

The Courts of Appeal have consistently held that the *mere existence* of 8(a)(1) violations does not *ipso facto* negate the Company's good faith doubt of the Union's majority status where there is substantial extrinsic evidence showing the loss of the Union's majority status. See, e.g., *NLRB* v. *Hannaford Bros. Co.,* 261 F. (2d) 638 (CA

1, 1958); *NLRB* v. *United Mineral & Chemical Corp.*, 391 F. (2d) 829 (CA 2, 1968); *NLRB* v. *S.S. Logan Packing Co.*, 386 F. (2d) 562 (CA 4, 1967); *NLRB* v. *Florida Citrus Canners Co-op*, 288 F. (2d) 630 (CA 5, 1961); *Hill-Behan Lumber Co.* v. *NLRB*, 396 F. (2d) 807 (CA 5, 1968); *Pulley d/b/a Capitol-Varsity Cleaning Co.* v. *NLRB*, 395 F. (2d) 870 (CA 6, 1968); *NLRB* v. *Ben Duthler, Inc.*, 395 F. (2d) 28 (CA 6, 1968); *Indiana Rayon Corp.* v. *NLRB*, 355 F. (2d) 535 (CA 7, 1966); *NLRB* v. *C. L. Frank, Inc.*, 351 F. (2d) 35 (CA 7, 1965).

On the other hand, when an employer embarks on a *planned* and *aggressive* campaign to destroy the Union, it is said that he has no good faith doubt of the Union's majority status. See, *Medo Photo Supply Corp.* v. *NLRB*, 321 U.S. 678 (1944) (the employer accepted employees' offer to quit the union in return for higher wages) and *Franks Bros Co.* v. *NLRB, supra* (the employer threatened to close down if the union won an election).

It would appear that the Court below, contrary to its own prior rulings and contrary to the rule of the other circuits, has failed to weigh "all relevant facts" and resorted to an *ipso facto* rule. Any realistic analysis of the melange of charges here would indicate that doctrine and rule were stretched by the Board to bring about the result of illegality. For example, it was recognized that Petitioner did not solicit union resignations. Petitioner discharged no one during the strike. Every action which was found to be illegal gathered its character from a prior decision of the Board by the same Trial Examiner and the building of one inference upon another.

It is submitted that a departure from existing and accepted rule has been made by the decision below. In addition, it is submitted that the decision below has determined an important issue involving federal law which has

not been, but should be, settled by this Court. On the undisputed facts, what has happened here is that the Board remedy of ordering reinstatement of recognition in the name of effectuating the policies of the Act has effectively frustrated a majority of employees in the enjoyment of their rights guaranteed under §7 of the Act to refrain from collective action.

B. The Vacation Issue.

Under the terms of the 1965 agreement:

> "Employees who during the year preceding August 1 were continuously on the payroll of the Company for the previous year and work up and through the last scheduled workday prior to the declared vacation period, will be eligible for vacation time off and pay . . . . "

In 1966, vacations were scheduled to begin August 1, 1966. As the strike had commenced on June 15, 1966, the Company did not give vacation pay to strikers as they had not worked "up and through the last scheduled workday prior to" August 1, 1966 and, therefore, the Company considered these employees ineligible for vacation pay.

The Board refused to give credence to the Company's interpretation of the agreement and ordered the Company to pay vacation benefits to striking employees. Essentially, the Board ruled that the Company had not fulfilled the test in *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). There this Court ruled that where an employer's entire work force was eligible for vacation benefits *which had accrued* under an expired contract and where the employer had paid these benefits only to non-striking employees, his act was discriminatory and he must come forward with evidence

> "to establish that he was motivated by legitimate objectives . . . . " 388 U.S. at 34.

First, the parties stated in the Flambeau Agreement that they intended to provide for time off from active employment.

Second, it should be noted that under the terms of the Flambeau Agreement, vacation pay *does not accrue* during the year:

> "Vacation pay . . . is not considered to accrue for each day or month of employment."

Third, under Wisconsin law it is recognized that the parties to a labor agreement are free to limit eligibility for vacation (or other) benefits, even though the result of such limitation is payment of those benefits to non-strikers and not to strikers.

> " ' . . . accrual is qualified . . . ' by various conditions in the contract like employee status on the eligibility date and these conditions must also be met." *Briggs* v. *Electric Auto-Lite Co.*, 37 Wis. 2d 275, at 279, 155 NW 2d 32 (1967).

In *Valeo* v. *J. I. Case Co.*, 18 Wis. 2d 578, 119 NW 2d 384 (1962), strikers who were eligible for vacation pay under the expired contract were denied those benefits. In *Briggs, supra*, the Wisconsin Supreme Court pointed out that had the strikers in *Valeo* not been eligible for vacation benefits under the terms of the contract, they would not have received the benefits.

The Board itself has recently pointed out that, under the proper circumstances, *Great Dane Trailers* might lead to what is indicated in *Briggs, supra.*

> "*Great Dane Trailers* (does not preclude) reliance on the often stated axiom that an employer need not remunerate strikers for work not performed." *Kimberly Clark Corp.*, 171 NLRB No. 82, 1968-1 CCH NLRB Par. 22, 492 (May 21, 1968).

It is respectfully submitted that Flambeau has completely fulfilled its burden to show its "legitimate objectives" in refusing to make vacation payments to striking employees as the Company need only point to the contract to establish the legitimacy of its action. Under both Wisconsin and Board law, these contractual restrictions are clearly legal. By its action in requiring Flambeau to make vacation payments to the strikers, the Court below has abrogated the Wisconsin law and has raised a serious question of federal law which should be answered by this Court.

C. The Questions Presented are Important to the Administration of the National Labor Relations Act and Should Be Resolved by This Court.

In Section 7, the Act gives employees the right to participate or to refrain from participating in concerted activities. By failing to balance the overwhelming nature of the evidence of lack of employee support for the union against the comparatively trivial nature of the unfair labor practices found here, the Board and the Court below fail to adequately consider the employees' right to free choice and, instead, impose unionization upon those employees by a remedy supposed to effectuate the policies of the Act.

Similarly, when those employees *do* chose unionization, they have a right to make an agreement through the collective bargaining process. This agreement must (if legal) be upheld as written and as intended. With regard to the vacation issue, it is patently obvious that neither the Board nor the Court below interpreted the Agreement as intended by the parties nor as established in past practice. In the rather extensive litigation which has evolved from this issue, it seems that there is great disagreement as to precisely what this Court meant when it said in *Great Dane*

Trailers, supra, that the employer must step forward showing "legitimate objectives" for his granting benefits to non-strikers and not to strikers. It is respectfully submitted that this case would give this Court an excellent opportunity to outline precisely what "objectives" are "legitimate" to such a situation. Such a determination will tend to limit litigation through the clear and precise definition of these terms.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WALTER S. DAVIS
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Flambeau Plastics Corporation

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 16560 SEPTEMBER TERM, 1967 APRIL SESSION, 1968

FLAMBEAU PLASTICS CORPORATION, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*,

and

LOCAL NO. 380, INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO, *Intervenor*.

On Petition for Review and Cross-Petition for Enforcement of an Order of the National Labor Relations Board.

AUGUST 2, 1968

Before CASTLE, *Chief Judge*, HASTINGS and SWYGERT, *Circuit Judges*.

SWYGERT, *Circuit Judge*. Flambeau Plastics Corporation, located in Baraboo, Wisconsin, is engaged in the manufacture of plastic products. It petitions for review of an order of the National Labor Relations Board issued on October 12, 1967.[1] The Board, in turn, requests enforce-

[1] The decision and order of the Board are reported at 167 N.L.R.B. No. 102 (1967).

ment of its order. The affected labor organization, Local No. 380, International Union, Allied Industrial Workers of America, AFL-CIO, was permitted to intervene in this court.[2]

The Board found that Flambeau Plastics violated section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5), by issuing an employee handbook which had the effect of undermining the union; by refusing to bargain with the union in good faith with respect to the institution of a progressive training program; by failing to bargain in good faith during negotiations for a new contract; by withdrawing recognition and refusing to bargain with the union after September 15, 1966; and by accelerating the reclassification of non-striking employees with the result that those employees received wage increases not offered to the union. The Board also found that Flambeau Plastics violated section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3), by discriminatorily denying to employees who were on strike vacation benefits to which they were otherwise entitled. Finally, the Board found that the company violated section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by assisting employees to resign from the union; by engaging in surveillance of union activities through photographing strikers on the picket line; and by interfering with union activities through company statements to employees.[3]

The Board ordered Flambeau Plastics to cease and desist from both engaging in the unfair labor practices

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[2] Local 380 filed a brief in this court supporting the Board's order.

[3] The Board adopted the trial examiner's findings without modification.

enumerated above and interfering in any other manner with the employees' rights guaranteed by section 7 of the Act. Affirmatively, the Board ordered the company to reimburse the striking employees for any loss of vacation pay suffered because of any discrimination against them; to offer reinstatement, upon request, to striking employees to their former or substantially equivalent positions; to extend to the striking employees upon reinstatement the benefits of accelerated reclassification granted during the strike to nonstriking employees; and to bargain collectively with the union upon request.

Two principal questions are presented in this review: (1) whether the record supports the company's contention that the trial examiner was biased against it; and (2) whether substantial evidence on the record as a whole supports the Board's findings that Flambeau Plastics committed a variety of violations of the National Labor Relations Act.

BACKGROUND

Events prior to those giving rise to the present proceeding are helpful in considering the numerous unfair labor practices found by the Board.

In March 1963 the union was certified as the collective bargaining agent of the company's production, maintenance, shipping, and warehouse employees. Contract negotiations began shortly thereafter. Eleven months after the start of negotiations, the union filed unfair labor practice charges against the company. The Board, adopting the trial examiner's decision,[4] found that the company

[4] The same trial examiner conducted the hearing on the charges under review in the instant proceeding.

had violated sections 8(a)(1), 8(a)(3), and 8(a)(5) of the Act by respectively imposing an over-broad no-solicitation rule, by both issuing a no-talking order and discriminatorily laying off a union adherent, and by not bargaining in good faith.[5] After the issuance of the Board's order on March 12, 1965, the parties resumed their bargaining, and on May 17, 1965 a one-year agreement, renewable from year to year, was executed.

FACTS

(a)

While the contract was in effect, the company in October 1965 issued an employees' handbook. The 1965 handbook was a revised edition of an earlier handbook which had been issued in 1960 and reprinted in 1963. The handbook, entitled "This is Your Company," contained a statement of the company's policy toward its employees, including what was expected of them, their work conditions, and the benefits to which they were entitled. The 1960 edition had outlined a grievance procedure which provided for an informal discussion with the foreman, then writing to the head of the department, and, finally, appealing to the president of the company. The 1963 edition had contained substantially the same information.

The 1965 revised edition, however, made no mention of a grievance procedure except to suggest to the employees that they should discuss any job problems with their foreman. The 1965 edition also suggested that in the event of an employee's discharge or layoff, the foreman would advise him as to the reason for such action,

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[5] The decision and order of the Board are reported at 151 N.L.R.B. No. 610 (1965).

and if unsatisfied, the employee might bring his complaint to the attention of the director of manufacturing or some other company official. The handbook omitted any reference to the grievance procedure stipulated in the union contract which provided for union representation in grievance matters in a three-stage procedure: first, an employee would present the grievance to the employee's foreman, "with or without the presence of a Union Stewart, as the employee may elect"; second, if the grievance were not settled, a union committee would present the grievance to a department director; and third, if the grievance remained unsettled, a union committee plus an International union representative would prosecute the matter before the company president. Although in the "Forward" the company stated, "This booklet contains revisions of former editions, bringing it into accord with an [union] agreement,"[6] the handbook omitted any reference to many other terms in the contract relating to the employees' working conditions.[7]

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[6] The only other reference to the union in the handbook was also contained in the "Forward":

> Relative to union membership, the above agreement provides for an "Open Shop." Therefore, it is *not necessary* for you to either become, or, if you are already a member, to remain a member of the Union in order to work at Flambeau. On the other hand, the law gives you the right to join the Union should you so desire. This places the matter of union membership directly in your own hands for your own decision. *Remember — you don't have to join the Union, but you can if you wish.* (Emphasis in original.)

[7] In February 1966 the union filed an unfair labor practice charge against the company, alleging a section 8(a)(5) violation by the issuance of the handbook in derogation and misrepresentation of the collective bargaining status of the union.

(b)

On April 1, 1966 the union notified the company that it desired to negotiate a new contract effective upon the expiration of the then existing contract in May. A series of bargaining sessions between the union and the company took place thereafter, including one on April 26. On or about that date, the company, without informing the union, filed a petition for unit clarification with the Board in connection with a "progressive training program" being planned by the company.[8]

Bargaining sessions continued after April 26, but these resulted in no significant progress. The company would accede to none of the union's proposals which included provision for union security and dues checkoff, sick pay, bereavement pay, insurance, a grievance procedure, a no-strike clause, automatic progression, and a 24-cent an hour wage increase. Although the employees, pursuant to a Wisconsin statute, had voted in a referendum (113 to 21) in favor of a union shop, the company refused to agree to a union security clause because it "always believed in the principle of free choice insofar as union membership is concerned." To the proposal for a voluntary dues check-off made by the union, the vice-president of the company told the union representatives that "inasmuch as the union had no share in collecting . . . accounts for the company," the management "saw no reason why the company should have to become bill collectors for the union."

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[8] Upon learning of the company's action, the union filed additional unfair labor charges of refusal to bargain.

On May 9 the company submitted a counterproposal to the union, offering a four per cent wage increase and certain modifications of the old contract provisions respecting vacations, holidays, jury duty, and the probationary period. On June 5 the union members met and voted both to reject the company's counterproposal and to strike. They also voted to leave to the bargaining committee the decision when to call the strike.

On June 15 the employees struck. Two days later the company instituted the four per cent wage increase proposal which it had previously offered the union, retroactive to the day of the strike. Thereafter a mediator of the Federal Mediation and Conciliation Service met with the parties on several occasions; however, he could not effect a settlement of the strike. During this period, the union modified its wage demand from 24 cents per hour to 16 cents per hour and reduced its request for sick leave by one-half, although holding fast to its other demands. The mediator was told by the company that "these monetary issues meant nothing to the company and that as long as a union shop, even a modified union shop was in the picture," the company would not alter its position. The last session with the mediator occurred on August 23. On September 15, 1966 the company wrote the union that it had concluded the union no longer represented a majority of the employees and consequently that it would no longer continue to bargain with the union.

(c)

Within two weeks after the strike began, a total of fifteen Flambeau Plastic employees resigned from the union. Each signed a letter of resignation (identical in language) which had been written for the employees by the company. The postage was paid by the company.

The company also did the actual mailing of the letters except in one instance. The evidence established that each employee who resigned had requested that the letters be prepared for him or had indicated a desire to leave the union and that each had signed the letters willingly.

(d)

On the morning of the strike, the vice-president of Flambeau Plastics appeared at the picket line and began taking moving pictures of the picketing strikers. His conduct was repeated every day for at least two months. The vice-president always took pictures of newcomers on the picket line; he also took pictures of the strikers' automobiles and their car licenses. Other company officials took similar pictures. Through a "News Sheet" issued by the company, the employees who remained on the job were told that the company was keeping a photographic record of the strike.

(e)

Before the collective bargaining contract became effective in May 1965, it was Flambeau Plastics' policy to grant paid vacations to its employees. That policy in a more liberal form, was incorporated in the contract.[9]

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[9] With respect to vacations, the contract provided in pertinent part:

> Employees who during the year preceding August 1 were continuously on the payroll of the Company for the previous year and work up and through the last scheduled workday prior to the declared vacation period, will be eligible for vacation time off and pay on the following basis:
> 1. One, but less than three years of employment as of August 1—One (1) week. 2. Three, but less than fifteen years of employment as of August 1—Two (2) weeks. 3. Fifteen or more years of employment as of August 1—Three (3) weeks. . . . An employee absent during the declared vacation

In 1965 the company closed down its operations for vacation purposes during the first week in July. In 1966, however, vacations were scheduled on an individual basis in accordance with the contract's terms from June 1 to December 31, though the contract had expired in May of that year. The employees who remained on the job after the strike began were granted vacations with pay in accordance with the terms of the expired contract. The strikers, however, were never paid for or granted vacations.

On December 12, 1966 the union wrote the company, demanding that "the Company pay to those employees eligible as of August 1, 1965, those vacation benefits that they were entitled to receive during the period June 1, 1966 through December 31, 1966." The company responded to this demand by writing to the union that "Flambeau does not recognize the union as representing the majority of its employees and even if it did, we do not believe the union could prosecute a claim for vacation allegedly due." In addition the company wrote, "the persons listed . . . are not eligible for vacation benefits pursuant to the terms and conditions of the expired labor contract dated May 17, 1965.

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period, if otherwise qualified, will receive vacation pay only upon return to work, except if such absence is due to industrial injury. . . . The Company shall have the option of shutting down operations for vacations, provided that the notice of such shutdown shall be posted not later than May 1 of each year. . . . It is the intention of the parties to this Agreement by these vacation provisions to provide for time off from active employment with pay for vacation purposes. Vacation pay is incidental to vacation time off and is not considered to accrue for each day or month of employment.

(f)

The agreement between the company and the union incorporated an employee evaluation procedure which had initially been adopted by the company in 1959. Under this procedure, each production employee's performance was periodically evaluated by his superior to determine whether the employee was qualified to advance in job classification or receive a merit increase in wages. Thus, a new employee was evaluated 44 days from the date of hire to determine whether he would be retained and classified as a class "D" operator; six months from the date of hire, he was revaluated to determine whether he was qualified to be reclassified as a class "C" operator; twelve months from the date of hire, he was revaluated to determine whether he was qualified to be reclassified as a class "B" operator; eighteen months from the date of hire, he was revaluated to determine whether he was qualified to be reclassified as a class "A" operator.

After the strike began, the company accelerated employee promotions from classification to classification in derogation of the contract as well as its previous practice. Twelve employees were promoted to class "D" after an average waiting period of 16 days from the date of hire; 22 employees were promoted to class "C" after an average waiting period of slightly over two months from the date of hire; 17 employees were promoted to class "B" after an average waiting period of approximately three months from the date of hire; and 14 employees were promoted to class "A" after an average waiting period of five months from the date of hire. By this acceleration in promotions, the company paid the promoted nonstriking employees higher wages than any increase offered to the union during the negotiations.

TRIAL EXAMINER'S BIAS

Flambeau Plastics' threshhold contention that the trial examiner was biased against it is without merit. As the Board noted, the company's complaint against the examiner was focused on his findings and conclusions and upon his analysis of the evidence. The company points to no instance that might indicate bias with respect to the hearing itself. In its attempt to establish prejudice, the company points to the fact that the examiner had heard the previous case against it in which he found the company guilty of refusing to bargain, thereby implying that he had prejudged the instant case. The company's argument is specious, particularly in light of the fact that it made no complaint against the examiner hearing the instant charges until after he had rendered the instant decision.

SECTION 8(a)(5) VIOLATIONS

(a)

From a reading of the employee handbook, it is apparent that the company deliberately omitted to inform the employees about the grievance procedure stipulated in the union contract, presumably to prevent grievances from being processed by the union.[10] Moreover, by discussing such matters as wages, hours, vacations, seniority, and overtime in the 1965 handbook, and yet omitting any mention of the fact that the contract with the union covered

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[10] The company argues that the fact that "there had not been one grievance presented by the union in accordance with the rights available under the agreement" indicates that the omissions in the handbook were of no consequence. However, this fact just as arguably indicates how effective the handbook was in short-circuiting the contractual grievance procedure.

these very matters, the company, in effect, not only belittled the union but also derogated from its collective bargaining status. This same result, in effect, was accomplished by the statements contained in the "Forward" to the handbook. We agree with the examiner that the handbook invited the employees to disregard and bypass the union. We conclude that substantial evidence on the record considered as a whole supports the Board's finding that the company violated section 8(a)(5) of the Act by this conduct.

(b)

Flambeau Plastics attempted to implement a "progressive training program" by filing a unit clarification petition with the Board during the negotiations for a new contract. The announced purpose of the program was to provide training for "selected employees . . . who upon satisfactory completion of the training would be guaranteed placement" as supervisors, salesmen, accountants, and engineers. Two days after the company filed its petition, the union demanded that the company bargain about the program, but the company refused on the ground that "the matter was before the NLRB" and that the company "had taken the proper action through the proper channels."

Whether or not the trainees were to be considered as part of the certified bargaining unit, the company was required to bargain with the union about the program. If the trainees were within the bargaining unit, the company was required, by Section 8(d) of the Act, to bargain with the union concerning the program because it would constitute a change of working conditions within the unit. If the trainees were outside the bargaining unit, they would be doing work which the employees in the unit ordinarily performed. This result would be analogous

to subcontracting work formerly done by unit employees and would likewise have obligated the company to bargain with the union concerning the program. *Fiberboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203 (1964). Under these circumstances, the company's argument that it had no obligation to bargain concerning the program while the petition for unit clarification was pending before the Board becomes irrelevant.[11] We conclude that substantial evidence on the record considered as a whole supports the Board's finding that the company refused to bargain with the union concerning the establishment of the progressive training program in violation of section 8(a)(5) of the Act.

(c)

The Board also found that Flambeau Plastics had violated section 8(a)(5) of the Act by refusing to bargain with the union in good faith toward a new contract,[12]

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[11] The fact that the company filed a unit clarification petition with the Board belies the company's argument that it had merely "created the plan intellectually."

[12] The record confirms the Board's observation in its brief filed with this court:

> [T]he Company's history of unfair labor practices, its repeated attempts to undermine and disparage the Union, its inflexibility at the bargaining table, its refusal to engage in any meaningful bargaining concerning union security and a dues check-off provision, its insistence that it retain complete control over all facets of the employment relationship, and its refusal to grant the Union any significant new benefits which its employees did not have without the Union, all provide ample record support for the Board's finding that the Company simply repeated its earlier performance at the bargaining table, and again, did not meet its legal obligation to bargain with the Union in good faith.

by refusing to recognize or bargain with the union after September 15, 1966,[13] and finally by accelerating the reclassification of nonstrikers.[14] We conclude that substantial evidence on the record considered as a whole supports these determinations by the Board.

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[13]The vice-president of the company testified at the hearing that the normal complement of employees numbered around 170; that of the 91 employees who had gone on strike, he had heard that 27 had found employment elsewhere, leaving only 64 union adherents. He further testified that replacements of strikers plus those who did not go on strike composed a working force of 115 at the company in September 1966. Since the union strength at that time was 64, according to his calculation, by adding that figure to the work force of 115, he arrived at a total work force of approximately 170. The company took the position that the 64 union members did not constitute a majority of the 170 employees.

Regardless of whether the company correctly calculated that the union had lost its majority status on September 15, the company could not take advantage of the alleged defections so as to justify its refusal any longer to recognize and bargain with the union. The examiner found that the evidence showed that the company's previous unfair labor practices were responsible for whatever diminution in union membership had occurred. We have already held some of these findings of unfair labor practices to be supported by substantial evidence of record. (See infra pp. 11-13 for other company conduct which we hold to be unfair labor practices.) Substantial evidence of record also supports the examiner's conclusion with respect to the diminution in union membership. NLRB v. Poultry Enterprises, Inc., 207 F.2d 522 (5th Cir. 1953).

[14] The law is settled that an employer may not unilaterally effect a new system of merit increases in wages during bargaining and without consultation with the union. NLRB v. Katz, 369 U.S. 736 (1962).

SECTION 8(a)(3) VIOLATION

"Under § 8(a)(3), it is unlawful for an employer by discrimination in terms of employment to discourage 'membership in any labor organization,' which includes discouraging participation in concerted activities, . . such as a legitimate strike." *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 233 (1963).

The company concedes that notwithstanding the expiration of the contract on May 17, 1965, it continued to grant to nonstriking employees vacations and vacation pay in accordance with the terms of the contract. On the other hand, the company refused to grant vacation pay to the strikers. In *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), the Supreme Court was confronted with a situation identical in relevant aspects to that in the instant case. In *Great Dane Trailers*, the employer refused to pay vacation benefits to strikers under the terms of an expired collective bargaining agreement although granting such benefits to nonstrikers. The Court said of this conduct: "There is little question but that the result of the company's refusal to pay vacation benefits to strikers was discrimination in its simplest form." 388 U.S. at 32. The Court made this further observation: "The act of paying accrued benefits to one group of employees while announcing the extinction of the same benefits for another group of employees who are distinguishable only by their participation in protected concerted activity surely may have a discouraging effect on either present or future concerted activity."[15] 388 U.S. at 32.

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[15] Under § 7 of the Act, the striking employees at Flambeau Plastics were engaged in protected concerted activities. NLRB v. Erie Resistor Corp., 373 U.S. 221, 233 (1963).

In accordance with the holding in *Great Dane Trailers,* it was incumbent upon Flambeau Plastics to demonstrate that its discrimination against the strikers in refusing to grant them vacation pay was motivated by legitimate objectives.[16] The company did not meet this obligation. In an attempted justification, the company argues that since the strike began on June 15, the strikers were "absent for more than 'six calendar weeks' prior to August 1, 1966." Consequently, the company's argument continues, the strikers were not continuously on the "payroll," as that term is defined in the contract, "during the year preceding August 1, 1966," thereby making the strikers ineligible for vacation benefits under the contract. The company is mistaken that the vacation eligibility date was August 1, 1966. It is clear from an analysis of both the precontract practice and the contract itself that the terminal date for vacation eligilibity was August 1, 1965. Thus, those employees who had worked for the year previous to August 1, 1965 and who had also worked up to the date of the strike on June 15, 1966 were eligible for vacations with pay regardless of whether they were strikers or nonstrikers.

The company seeks further to justify its position respecting vacation pay by arguing that the strikers were not eligible for such pay under either the contract or the continuing company policy inasmuch as the contract provided that "vacation pay is incidental to vacation time off

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[16] The Supreme Court held:

> [O]nce it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that it was motivated by legitimate objectives since proof of motivation is most accessible to him. 388 U.S. at 34.

and is not considered to accrue for each day or month of employment." The company's argument continues: since no striker had taken "vacation time off" or had worked up to the last scheduled workday before his "vacation time off," the strikers were not eligible for vacation pay. The answer to this argument is that those strikers who were eligible for vacation benefits were eligible before the strike started on June 15, 1966. Since vacations could be taken at any time between June 1, 1966 and December 31, 1966, when the employees went off the job on June 15, 1966, their action was tantamount to taking "vacation time off."

We agree with the Board's determination that the company's actions with respect to vacation pay were discriminatory and conclude that substantial evidence on the record considered as a whole supports the finding of a violation of section 8(a)(3) of the Act.

SECTION 8(a)(1) VIOLATIONS

We do not think any elaboration or discussion is necessary to dispose of the routine questions arising from the section 8(a)(1) violations found by the Board. We have considered these questions in light of the contentions made by the company and conclude that the Board's findings are supported by substantial evidence on the record considered as a whole.

Finally, we hold that the Board's determination that the strike was caused and prolonged by the company's unfair labor practices is supported by substantial evidence on the record considered as a whole.

The Board's order will be enforced.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

Flambeau Plastics Corporation, Petitioner,	)	
v.	)	No. 16,560
National Labor Relations Board, Respondent.	)	

August 29, 1968

JUDGMENT

BEFORE: CASTLE, *Chief Judge,* HASTINGS, and SWYGERT, *Circuit Judges.*

This Cause came on to be heard upon the petition of Flambeau Plastics Corporation, to review an order of the National Labor Relations Board issued on October 12, 1967, and upon cross-application for enforcement of an order of the National Labor Relations Board. The Court heard argument of respective counsel on June 4, 1968, and has considered the briefs and transcript of record filed in this cause. On August 2, 1968, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

On Consideration Whereof, it is ordered and adjudged by the United States Court of Appeals for the Seventh Circuit that the said order of the National Labor Relations

Board in said proceeding be enforced, and that Flambeau Plastics Corporation, its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

/s/ *Latham Castle*
Judge, United States Court of Appeals for the Seventh Circuit
/s/ *John S. Hastings*
Judge, United States Court of Appeals for the Seventh Circuit
/s/ *Luther M. Swygert*
Judge, United States Court of Appeals for the Seventh Circuit

A True Copy:
Teste:
Kenneth J. Carrick
Clerk of the United States Court of
Appeals for the Seventh Circuit.
By *H. K. McCormack*
Deputy Clerk.

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Flambeau Plastics Corporation	
and	Case Nos. 30-CA-351
Local No. 380, International Union, Allied Industrial Workers of America, AFL-CIO	30-CA-455

DECISION AND ORDER

On May 25, 1967, Trial Examiner Eugene E. Dixon issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel, the Respondent, and the Charging Union filed exceptions to the Trial Examiner's Decision and briefs in support of their exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision and the entire record in this case, including the exceptions and briefs, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, as herein modified. [1]

The Remedy

The General Counsel has excepted to the Trial Examiner's failure to provide a remedy for his finding that the Respondent violated Section 8(a)(1), (3), and (5) of the Act by reclassifying nonstriking employees in much shorter periods of time than it had reclassified employees prior to the strike, thereby granting wage increases in excess of those offered the Union during negotiations. We agree and shall provide that Respondent cease and desist from reclassifying nonstrikers at a pace faster than would have been justified under its established practice before the strike. Additionally we shall provide that the

---

[1] The Respondent contends that the Trial Examiner was biased as evidenced by the substance and tone of his decision. This charge of bias is not based on any alleged statements of the Trial Examiner which might indicate that he had prejudged this case or upon his conduct or rulings made at the hearing but is directed to his findings and conclusions, and the analysis of the facts upon which they are based, as set forth in the Trial Examiner's Decision. Possible errors of this sort, which we do not find herein in any event, are hardly sufficient to establish bias. Accordingly, we reject this contention. Hot Shoppes, Inc., 146 NLRB 802 footnote 2; The Great Atlantic & Pacific Tea Company, 129 NLRB 757, 758 footnote 3; Sears, Roebuck & Company, 110 NLRB 226, 227 footnote 2.

Respondent extend to striking employees who return to work the same benefits of accelerated reclassification heretofore granted nonstriking employees.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as modified below, and hereby orders that Respondent, Flambeau Plastics Corporation, Baraboo, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified:

1. Add the following as paragraph 1(c) of the Trial Examiner's Recommended Order, and consecutively reletter the paragraphs subsequent thereto:

"(a) Unilaterally accelerating reclassifications of nonstriking employees, contrary to its contract with the above-named labor organization and past practice, in derogation of its duty to bargain."

2. Add the following as paragraph 2(c) of the Trial Examiner's Recommended Order, and consecutively reletter the paragraphs subsequent thereto:

"(c) Upon reemployment of striking employees extend to them the benefits of accelerated reclassification granted during the strike to nonstriking employees."

3. Insert the following as the fifth indented paragraph of the Appendix:

> We Will Not accelerate the reclassification of nonstriking employees, contrary to our contract with the above-named labor organization and our past practice, in derogation of our duty to bargain.

4. Insert the following as the tenth indented paragraph of the Appendix:

> We Will, upon reemployment of any of our striking employees, extend to them the benefits of accelerated reclassification granted during the strike to nonstriking employees.

Dated, Washington, D.C. October 12, 1967.

Frank W. McCulloch, Chairman

Gerald A. Brown, Member

Howard Jenkins, Jr., Member

(Seal) National Labor Relations Board

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No. 678.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

FLAMBEAU PLASTICS CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

LOCAL NO. 380, INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO,
Intervenor.

OPPOSITION TO THE GRANT OF A WRIT OF CERTIORARI.

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LOCAL NO. 380, INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO,
Intervenor.

OPPOSITION TO THE GRANT OF A WRIT OF CERTIORARI.

To the Justices of the Supreme Court of the United States:

Local No. 380, International Union Allied Industrial Workers of America, AFL-CIO[1] (hereinafter called Union) herewith submits its brief in opposition to the grant of a writ of certiorari in this matter.

[1] The Petitioner (hereinafter called Petitioner or Flambeau) incorrectly identified the Intervenor's name as "Local No. 380, *Industrial* Union . . ." The correct name of the Intervenor is Local No. 380, *International* Union Allied Industrial Workers of America, AFL-CIO.

STANDING OF UNION TO FILE OPPOSITION.

The Union was the Charging Party which initiated the proceedings before the National Labor Relations Board (hereinafter called Board). In the proceedings had before the Court of Appeals for the Seventh Circuit the Union by order of said Court was permitted to intervene as a party respondent and did, thereafter, participate fully in said proceedings. (A copy of the Court of Appeals Order is printed in the Appendix attached to this Brief at App. 1.)

OPINIONS BELOW.

The decision and order of the Board issued October 12, 1967, and is reported at 167 NLRB No. 102. (See Pet. Br. Appendix C, pp. 20-23.)

The Petitioner did not include in its brief the Trial Examiner's findings, conclusions and recommendations, however, which were adopted by the Board. The decision of the Trial Examiner is printed in full in the Joint Appendix which was submitted to the Court of Appeals and is located at pp. 8-75 of said Joint Appendix and the Union understands that this Joint Appendix has been submitted to the United States Supreme Court as part of the record and can be referred to by the parties herein.

The decision of the Court of Appeals issued August 2, 1968, and is reported at ... F. 2d ..., 68 LRRM 2981, and is set forth in full in Petitioner's Brief (Pet. Br. Appendix A, pp. 1-17).

JURISDICTION.

The judgment of the Court of Appeals was entered on August 29, 1968 (See Pet. Br. Appendix B, pp. 18-19).

On September 26, 1968, Petitioner sought and obtained an order staying the mandate of the Court of Appeals. (A copy of the Court of Appeals orders per the Honorable Luther M. Swygert, Circuit Judge, regarding the stay of mandate is printed in the Appendix attached to this brief at App. pp. 2-3.)

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 USC, Section 1254, if it deems the questions presented warrant such review in light of the policy set forth in Rule 19 (b), Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED.

The Union believes that the questions as presented by Petitioner (See Pet. Br., pp. 2-3) do not accurately reflect the factual findings of the Board and affirmed by the Court of Appeals and in substance Petitioner's questions are premised on facts not established in the record.

The Union would, therefore, submit that the real questions presented are:

1. Did the Court of Appeals apply the correct standard when it determined that there was substantial evidence on the record considered as a whole to support the Board's finding that the strike which started on June 15, 1966, was caused by and prolonged by Petitioner's unfair labor practices and the loss, if any, of the Union's majority status was attributable to the Petitioner's unfair labor practices?

2. Did the Court of Appeals apply the correct standard when it enforced the Board's order, which order

required Petitioner, amongst other things to continue to recognize and bargain collectively with the Union as the employees' bargaining representative notwithstanding that as a result of Petitioner's unfair labor practices the Union may have lost its majority status?

3. Did the Court of Appeals apply the correct standard when it determined that there was substantial evidence on the record considered as a whole to support the Board's finding that the terminal date for vacation eligibility was August 1, 1965, and not August 1, 1966, as argued by the Petitioner?

PROCEEDINGS BELOW.

The Union for purposes material herein accepts the Petitioner's statement of what occurred in the proceedings below (See Pet. Br. p. 3).

STATUTES INVOLVED.

The Union would only add the following pertinent portions of the National Labor Relations Act (61 Stat. 136, 29 USC 151, et seq.) to those already set forth in Petitioner's Brief (See Pet. Br. p. 4).

> "Section 10 (c) . . . The Board shall state its findings of fact and shall issue . . . an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action . . . as will effectuate the policies of this Act . . ."
> "Section 10 (e) . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . . Upon the filing of the record with it the jurisdiction of the [Court of Appeals] shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari . . . as provided in section 1254 of title 28. . . ."

STATEMENT OF THE CASE.

In regards to the background history, the Court of Appeals found,

> ". . . Events prior to those giving rise to the present proceeding are helpful in considering the numerous unfair labor practices found by the Board.
>
> In March 1963 the union was certified as the collective bargaining agent of the company's production, maintenance, shipping, and warehouse employees. Contract negotiations began shortly thereafter. Eleven months after the start of negotiations, the union filed unfair labor practice charges against the company. The Board, adopting the trial examiner's decision,[4] found that the company had violated sections 8 (a) (1), 8 (a) (3), and 8 (a) (5) of the Act by respectively imposing an over-broad no-solicitation rule, by both issuing a no-talking order and discriminatorily laying off a union adherent, and by not bargaining in good faith.[5] After the issuance of the Board's order on March 12, 1965, the parties resumed their bargaining, and on May 17, 1965, a one-year agreement, renewable from year to year, was executed.

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[4] The same trial examiner conducted the hearing on the charges under review in the instant proceeding.

[5] The decision and order of the Board are reported at 151 NLRB No. 610 (1965)" (See Pet. Br. Appendix A, pp. 3-4).

The labor contract was reopened and the Union and Flambeau thereafter held bargaining meetings but as found by the Trial Examiner ". . . with no significant progress being made . . ." (Joint Appendix p. 13).

On June 15, 1966, the Union called a strike, which strike was found by the Trial Examiner to have been caused by Petitioner's unfair labor practices (See Joint

Appendix p. 66). This finding of the Trial Examiner was adopted by the Board and affirmed by the Court of Appeals (See Pet. Br. Appendix A, p. 14, footnote 13).

On September 15, 1966, while the strike was in progress and while the Trial Examiner was in the process of preparing his decision having held a hearing on August 15, 1966, the Petitioner unilaterally withdrew recognition from the Union as the employees' collective bargaining representative and at all times thereafter it has refused to bargain collectively with the Union as the employees' bargaining representative.

In regards to the denial of vacation pay the Court of Appeals found,

> ". . . The Company is mistaken that the vacation eligibility date was August 1, 1966. It is clear from an analysis of both the precontract practice and the contract itself that the terminal date for vacation eligibility was August 1, 1965. Thus, those employees who had worked for the year previous to August 1, 1965, and who had also worked up to the date of the strike on June 15, 1966, were eligible for vacations with pay regardless of whether they were strikers or non-strikers . . ." (See Pet. Br. Appendix A, p. 15).

REASONS FOR DENYING WRIT.

Contrary to the Petitioner's assertion the Union respectfully submits that the instant case presents neither a new or novel question of law nor does it present any legal questions which this Court has not already passed upon.

Indeed, the Petitioner's real contention is that it disagrees with the *factual* determinations made by the Trial Examiner and adopted without dissent by the Board and affirmed by the Court of Appeals, again, without dissent.

This Court has held as to issues concerning questions of fact, ". . . Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied . . ." *Universal Camera Corp. v. NLRB,* 340 U. S. 474, 491.

Bearing in mind the above principles the Union will take up the specific arguments of the Petitioner (See Pet. Br. pp. 7-13).

A. The Question of Withdrawal of Recognition.

The Petitioner's argument concerning its withdrawal of Union recognition on September 15, 1966 and thereafter refusing to bargain collectively with the Union as the bargaining representative of its employees really involves two questions, i. e., was such conduct a violation of the Act, if so, can the Board as part of its remedy powers order the Petitioner to continue to recognize the Union and to bargain collectively with it as the employees' bargaining representative notwithstanding that the Union may have lost its majority status owing to Petitioner's unfair labor practices?

The Petitioner would attempt to isolate the conduct of September 15, 1966, and thereby treat its withdrawal of Union recognition as if it were in a vacuum, so to speak, and not at all related to the other conduct it was found to have engaged in prior to September 15, 1966, and which conduct was found to have independently violated Section 8 (a) (5) as well as 8 (a) (1) of the Act.

The Petitioner states, ". . . The Courts of Appeals have consistently held that the *mere existence* of 8 (a) (1) violations does not *ipso facto* negate the Company's good faith doubt of the Union's majority status where there

is substantial extrinsic evidence of showing the loss of the Union's majority status . . ." (See Pet. Br. p. 8).

The Petitioner totally ignores that the Court of Appeals specifically found that even prior to September 15, 1966, the Petitioner had independently engaged in other conduct violating *Section 8 (a) (5)* of the Act ". . . by refusing to bargain with the union in good faith toward a new contract . . ." (See Pet. Br. Appendix A, p. 13).[2]

The Court of Appeals further held,

> ". . . The examiner found that the evidence showed that the company's previous unfair labor practices were responsible for whatever diminution in union membership had occurred . . . Substantial evidence of record also supports the examiner's conclusion with respect to the diminution in union membership. *NLRB v. Poultry Enterprises, Inc.*, 207 F. 2d 522 (5th Cir. 1953)" (See Pet. Br. Appendix A, p. 14, footnote 13).

Contrary to the Petitioner's assertion ". . . that a departure from existing and accepted rule has been made by the decision below." (Pet. Br. 9), the Union submits that the Court of Appeals correctly applied the law to the *facts* as found and based on the substantial evidence rule, see *Universal Camera Corp. v. NLRB, supra.*

Insofar as the Petitioner questions the propriety of the remedial order issued by the Board and affirmed by the Court of Appeals, it is clear that such order is within the Board's statutory authority, see *Franks Bros. Co. v. NLRB*, 321 U. S. 702.

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[2] The Petitioner has not appealed from this finding of the Court of Appeals.

B. Vacation Issue.

The Petitioner admits in its brief that ". . . The Board refused to give credence to the Company's interpretation of the agreement and ordered the Company to pay vacation benefits to striking employees . . ." (Pet. Br. 10). The Court of Appeals expressly affirmed the Board's interpretation and asserted,

> ". . . The company is mistaken that the vacation eligibility date was August 1, 1966. It is clear from an analysis of both the precontract practice and the contract itself that the terminal date for vacation eligibility was August 1, 1965 . . ." (See Pet. Br. Appendix A, p. 16).

The Petitioner, notwithstanding the above findings of fact, persists in its argument to this Court as if the correct date for vacation eligibility was August 1, 1966.

In substance, Petitioner again disagrees with a factual determination made by the Board and affirmed by the Court of Appeals. It is clearly not the function of this Court to reweigh the evidence at this stage of the proceeding, *Universal Camera Corp. v. NLRB, supra.*

Accepting the findings of the Board which were affirmed by the Court of Appeals, it is clear that the denial of already accrued vacation pay to the striking employees violated Sections 8 (a) (1) and (3) of the Act, *NLRB v. Great Dane Trailers, Inc.*, 388 U. S. 26.

It should also be noted that in framing its second question the Petitioner asserted ". . . and the employer's denial is based upon good faith belief it was asserting its contract rights" (See Pet. Br. 3).

In its argument Petitioner did not discuss the defense of a good faith but mistaken interpretation of its contract as a defense but instead argued that the Board and Court had both erroneously interpreted the contract.

Assuming *arguendo* that Petitioner had in good faith but mistakenly withheld the striking employees' vacation pay based on its erroneous construction of the contract, it would nonetheless under the circumstances of this case be a violation of the Act, *NLRB v. Burnup & Sims*, 379 U. S. 21; *NLRB v. C & C Plywood Corp.*, 285 U. S. 421.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that the Petition for a writ of certiorari in this matter should be denied.

Respectfully submitted,

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APPEAL

APPENDIX A.

United States Court of Appeals
For the Seventh Circuit,
Chicago, Illinois 60604.

Wednesday, December 6, 1967.

Before Hon. Walter J. Cummings, Circuit Judge.

Flambeau Plastics Corporation,
Petitioner,

vs.

National Labor Relations Board,
Respondent.

No. 16,560.

Petition for Review of an Order From the National Labor Relations Board.

On consideration of the motion of Local Number 380, International Union Allied Industrial Workers of America, AFL-CIO,

It Is Ordered that Local Number 380, International Union Allied Industrial Workers of America, AFL-CIO be and that they are hereby granted leave to intervene in the above entitled matter.

APPENDIX B.

United States Court of Appeals
For the Seventh Circuit,
Chicago, Illinois 60604.

Thursday, September 26, 1968.

Before Hon. Luther M. Swygert, Circuit Judge.

Flambeau Plastics Corporation,
Petitioner,
vs.
National Labor Relations Board,
Respondent.
No. 16,560.

Petition for Review From an Order From the National Labor Relations Board.

On consideration of the motion and affidavit of counsel for petitioner,

It Is Ordered that the execution of the judgment of this Court entered on August 29, 1968 be stayed in accordance with the provisions of Rule 41 (b) of the Federal Rules of Appellate Procedure.

APPENDIX C.

United States Court of Appeals
For the Seventh Circuit,
Chicago, Illinois 60604.

Monday, September 30, 1968.

Before Hon. Luther M. Swygert, Circuit Judge.

Flambeau Plastics Corporation,
Petitioner,
vs.
National Labor Relations Board,
Respondent.
No. 16,560.

Petition for Review From an Order From the National Labor Relations Board.

Subsequent to the entry of this Court's order on September 26, 1968 in the above-entitled cause, there was filed in the office of the Clerk of this Court intervenor's opposition to petitioner's motion for stay of mandate. On consideration whereof,

It Is Hereby Ordered that the said opposition to petitioner's motion for stay of mandate be overruled with the provision that no further stay of execution of this Court's decree heretofore entered on August 29, 1968 be granted beyond the thirty (30) day stay granted by this court in its order of September 26, 1968, in accordance with the provisions of Rule 41 (b) of the Federal Rules of Civil Procedure.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 678

FLAMBEAU PLASTICS CORP., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–17) is not yet reported. The Board's Decision and Order (R. 4–75)[1] are reported at 167 NLRB No. 102.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1968 (Pet. App. 18–19). The petition for a writ of certiorari was filed on October 23, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "R." refers to the Joint Appendix in the court below.

QUESTIONS PRESENTED

1. Whether petitioner unlawfully withdrew recognition from the Union on the ground that it no longer represented a majority of the employees, where such loss of support was attributable to petitioner's unfair labor practices.

2. Whether petitioner unlawfully discriminated against striking employees by depriving them of vacation pay which they had previously earned.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at page 4 of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

In March 1963, the Union [2] was certified as the collective bargaining representative of the Company's production, maintenance, shipping, and warehouse employees. After proceedings in which the Board found that the Company had refused to bargain and engaged in other unfair labor practices, a one-year collective bargaining agreement was finally entered into on May 17, 1965 (R. 12; 376, 392; 151 NLRB 591).

In October 1965, the Company issued a revised version of its employees' handbook. For the first time, the handbook omitted reference to the Company's

[2] Local No. 380, Industrial Union, Allied Industrial Workers of America, AFL–CIO.

grievance procedure, which the contract had augmented by permitting the employees to have Union representation in grievance matters. The handbook mentioned the Union only to emphasize that employees had the right to join or refrain from joining unions as they wished. (R. 14–19, 35.)

Pursuant to the Union's request to negotiate a new contract, a series of bargaining sessions commenced in early April 1966 (R. 59–61; 268–279, 418–435, 441–442). On April 26 the Company, without informing the Union, filed a petition with the Board to add to the bargaining unit certain employees whom the Company planned to train for advanced positions (R. 24; 400–404, 146, 82–88).[3] In the bargaining sessions, the Company refused to agree or compromise on any of the Union's proposals including a union-shop provision, which the employees had approved by a vote of 113 to 21 in an election conducted pursuant to State law (R. 61–62; 286–287, 313, 436–437, 444). On June 15, the employees struck (R. 29; 289–290, 141–142). Two days later, the Company put in effect a four-cent wage increase which the Union had previously rejected (R. 59–61; 268–279, 441–442). Efforts at conciliation by the Federal Mediation and Conciliation Service were unsuccessful despite concessions by the Union (R. 59, 62–63; 286–289, 318–319).

During the strike, the Company assisted 15 employees in withdrawing from the Union (R. 29–31; 192–193, 165–167, 106–110, 183–185, 171–177, 407–408),

[3] When the Union learned of the existence of the program, it requested bargaining on this issue, which the Company refused (R. 24–25; 146–147).

kept the activities of the striking employees under photographic surveillence (R. 35–37; 224–228 342, 409–410), and accelerated employee promotions in derogation of the contract and its own past practice (R. 46–47; 394–397, 388). On September 15, 1966, the Company withdrew recognition from the Union, claiming that it had lost its majority (R. 40, 65; 417). The Company also paid non-striking employees the vacation benefits which they had earned under the lapsed agreement, but refused to make such payments to the strikers (R. 41, 222.)

B. THE DECISIONS BELOW

The Board found that the Company violated Section 8(a)(5) of the Act by issuing an employee handbook which had the effect of undermining the Union; by refusing to bargain with the Union with respect to the institution of a progressive training program; by negotiating without a good-faith intention to reach a new agreement; by withdrawing recognition from the Union on September 15, 1966; and by accelerating the reclassification of non-striking employees and thereby granting them a wage increase never offered to the Union in the negotiations (R. 23, 28, 48, 64–65). The Board further found that the June 15 strike was caused by the Company's unlawful refusal to bargain with the Union, and that any loss in the Union's majority status was attributable to the Company's unfair labor practices (R. 65–66). In addition, the Board found that the Company violated Section 8(a)(1) of the Act by engaging in surveillence of Union activities and assisting employees in withdraw-

ing from the Union (R. 35, 38), and that it violated Section 8(a)(3) by discriminatorily denying vacation pay to the strikers (R. 44). The Board ordered the Company to cease and desist from the unfair labor practices found; to make the striking employees whole for any loss of vacation pay which they may have suffered; to reinstate them, upon application, to their former positions with the benefit of the accelerated reclassification; and to bargain, upon request, with the Union (R. 70–72).

The court of appeals sustained the Board's findings and enforced its order (Pet. App. 1–17).

ARGUMENT

1. Petitioner's contention (Pet. 7–10) that it was justified in withdrawing recognition from the Union because it had reasonable grounds for believing that the Union had lost majority support is fully answered by the findings of the Board (R. 65–66) and the court of appeals (Pet. App. 14 n.13) that any loss of majority was attributable to petitioner's unfair labor practices. It is well settled that, in these circumstances, petitioner was not relieved of its duty to recognize and bargain with the Union. See *Franks Bros. Co.* v. *National Labor Relations Board,* 321 U.S. 702; *National Labor Relations Board* v. *Warren Co.,* 350 U.S. 107, 112; *National Labor Relations Board* v. *Poultry Enterprises, Inc.,* 207 F. 2d 522, 525 (C.A. 5).[4]

[4] Although petitioner apparently assumes (Pet. 8–9) that its unfair labor practices were mere technical violations of Section 8(a)(1), the Board found (R. 64) that petitioner committed

2. Petitioner's argument (Pet. 10–12) that the withholding of vacation benefits from the strikers was not discriminatory rests on the premise that those benefits had not accrued under the contract before the strike started on June 15, 1966. That premise, however, was rejected by the court of appeals in light of the precontract practice and the contract itself,[5] and the contention does not warrant further review. See *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502. The court of appeals correctly held that this case was controlled by *National Labor Relations Board* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, in which the employer, without any legitimate justi-

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substantial unfair labor practices which "clearly show its rejection of the [principles] of collective bargaining and of the purposes and policies of the Act."

[5] The contract provided that (R. 386):

> Employees who during the year preceding August 1 were continuously on the payroll of the Company for the previous year and work up and through the last scheduled workday prior to the declared vacation period, will be eligible for vacation time off and pay * * *.

As the court below found (Pet. App. 16), both the contract itself and the Company's precontract practice (on which the contract was patterned) indicate that the terminal date for vacation eligibility was August 1, 1965 (rather than August 1, 1966, as the Company contended), and thus those strikers who had been on the payroll for the year prior to that date qualified for vacation benefits before the strike started on June 15, 1966. Nor is a different conclusion required by the provision of the contract (R. 388) that "[v]acation pay is incidental to vacation time off and is not considered to accrue for each day or month of employment." Under the contract, vacations could be taken at any time between June 1 and December 31, 1966 (R. 41). Accordingly, as the court below further found (Pet. App. 17), "when the employees went off the job on June 15, 1966, their action was tantamount to taking 'vacation time off.'"

fication, denied strikers vacation benefits which they earned before the strike, while continuing to pay such benefits to non-strikers.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1968.

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